No. 96-568

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Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH ONCALE,

Petitioner,

—v.—

SUNDOWNER OFFSHORE SERVICES, INC. ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Amici are law professors who teach employment law, discrimination law, women, gender, or race and the law. Because federal courts across the country have disposed of Title VII same-sex sexual harassment claims in inconsistent ways, and because we have studied the history and fundamental principles that underlie sexual harassment doctrine specifically, and discrimination laws generally, we provide the Court with our understanding of the issues raised in this case.

Amici have the consent of the parties to file this brief. Letters of consent have been filed separately in this Court. A complete list of *amici* is set forth in Appendix A.[1]

SUMMARY OF THE ARGUMENT

The court of appeals erred in holding that Title VII "does not recognize male-on-male [sexual harassment] claims." *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118, 120 (5th Cir. 1996). Such a blanket rule barring same-sex sexual harassment claims under Title VII finds no support in either the text of Title VII, or in the jurisprudential history of sexual harassment doctrine.

Amici urge the Court to reverse the Fifth Circuit Court of

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[1] This brief was authored by the *amici* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

Appeals' determination that Title VII bars all same-sex sexual harassment claims, and remand the case for further fact-finding with respect to the circumstances under which Mr. Oncale alleges he was sexually harassed. Such an inquiry is necessary in cases of this kind to determine whether the harassment amounted to discrimination because of sex. The inferences that can be reasonably drawn in traditional sexual harassment cases - to wit, that the conduct is a form of sex discrimination prohibited by Title VII - cannot be so easily drawn from the conduct in same-sex sexual harassment cases. Nevertheless, though a more extensive inquiry may be called for, many same-sex harassment cases fit easily within Title VII's definition of sex discrimination. Among the types of evidence that the trial court may find probative on this point are whether Mr. Oncale was singled out for harassment because he did not conform to traditional norms of masculinity, and/or whether he suffered continued offensive sexual conduct because he objected to the hyper-masculine environment that characterizes many all-male workplaces.

ARGUMENT

As the discussion that follows amply demonstrates, sexual harassment has been understood by the courts to be a form of sex stereotyping that offends Title VII. *Amici* will briefly set out the history of sexual harassment doctrine and the theories under which unwelcome conduct of a sexual nature in the workplace has come to be understood as a form of sex discrimination. This discussion will make clear that the sexual equality principles at stake in different-sex sexual harassment cases may be present in same-sex sexual harassment as well, making same-sex sexual harassment cases actionable under Title VII. *See generally*, Katherine M.

Franke, *What's Wrong With Sexual Harassment?*, 49 STAN.L.REV. 691 (1997). In our view, the Fifth Circuit's ruling fails to appreciate why sexual harassment of any kind is a form of sex discrimination by ignoring the ways in which sex stereotyping can manifest itself in the workplace.

Neither the text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, nor well-established sexual harassment doctrine supports the Fifth Circuit's blanket rule barring sexual harassment claims between persons of the same sex. The principles at work in traditional sexual harassment cases - where a man is charged with sexually harassing a woman - can apply with equal force where victim and harasser are of the same sex. This Court reiterated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), that when an employer acts on the basis of sex stereotyping, the employer has acted on the basis of gender in violation of Title VII. Sexual harassment is a form of sex stereotyping. *See, e.g., Drinkwater v. Union Carbide Corp.*, 904 F.2d 853, 861 n. 15 (3d Cir. 1990). Not in *Price Waterhouse, Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 7 (1986), *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), nor in any other decision construing the meaning of "discrimination because of sex" has this Court required that the party acting on the basis of sex stereotyping be of a different sex from the victim thereof.

I. FOR OVER TWO DECADES, SEXUAL HARASSMENT LAW HAS PROHIBITED CONDUCT THAT REINFORCES SEX STEREOTYPES IN THE WORKPLACE

The concept of sexual harassment as a kind of sex

discrimination is now well-established. After a period of unsuccessful litigation in which sexual harassment claims were dismissed under a "boys will be boys" view of the harm, in the late 1970s and early 1980s courts began to recognize that unwelcome sexual conduct in the workplace should be understood as a form of discrimination because of sex.

Early sexual harassment litigation produced a series of defeats for plaintiffs who sought to challenge sexually harassing work environments under Title VII. In *Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without reported decision*, 562 F.2d 55 (9th Cir. 1977), one of the first sexual harassment cases litigated under Title VII, two female clerical workers alleged that onerous verbal and physical sexual harassment by their immediate male supervisor amounted to discrimination on the basis of sex. The court recognized that Title VII extended beyond discriminatory hiring or firing to the terms and conditions of employment once hired, but nevertheless rejected the plaintiff's harassment theory. In prior cases, the court observed, the discriminatory acts had been undertaken pursuant to company policy, or in pursuit of some relative corporate advantage derived from the discriminatory practices. *Id.* at 163. The sexually harassing conduct of which Corne complained, however, was different:

> In the present case, [harasser's] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [harasser] was satisfying a personal urge. Certainly no employer policy is here involved.... [A]n outgrowth of holding such

> activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.

Id. at 163-64. The court's reasoning in *Corne* is representative of the treatment sexual harassment claims received generally during this period.[2] On this view, sexual content or coercion in workplace relationships is merely the inevitable result of a sexually heterogeneous workplace -- it is the price women pay for participating equally in the wage-labor market.

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[2] *See e.g. Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976), *rev'd and remanded*, 568 F.2d 1044 (3d Cir. 1977)(court dismissed female employees charge that she had been discriminated against because her boss asked her to lunch, then became drunk, made sexual advances toward her, and threatened retaliation when she tried to leave the restaurant. "[N]atural sexual attraction can be subtle. If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time."); *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976)("It is conceivable, under plaintiff's theory that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions."), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979).

On one level, the early sexual harassment cases were about determining employer responsibility under Title VII in light of pre-existing agency principles. On a deeper level, however, the cases legitimized a view of workplace sexual harassment that regards the plaintiffs' claims as private "gripes" rather than discriminatory "grievances," and regards the defendants' conduct as horseplay or locker room antics - normal and healthy manifestations of male sexuality that have simply gotten out of hand. This mistaken view of the scope and meaning of Title VII generally, and sexual harassment specifically, was short lived as courts came to appreciate the discriminatory nature of sexual harassment.

Rather than conceptualize sexual harassment as an independent wrong of sexual misconduct, in the late 1970s advocates for women's rights argued that the conduct was a species of sex discrimination, because "only the sex discrimination laws provide a coherent examination of sexually harassing conduct as a legal wrong." Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, J. SOC. ISSUES, Spring 1995, at 193 (citation omitted). Advocates reframed the problem of sexual harassment as a problem of sex-based power. In SEXUAL HARASSMENT OF WORKING WOMEN (1979), Catharine MacKinnon argued that sexual harassment is sex discrimination because it causes arbitrary differentiation between men and women in the workplace, such that "men are not placed in comparable positions to women when they are comparably circumstanced." *Id* at 216. In short, "[s]exual harassment limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions." *Id.* at 193.

To show that sexual harassment was sex discrimination, feminist advocates began with the relatively small body of Title VII sex and race discrimination cases decided in the mid to late 1970s. The case for finding *quid pro quo* harassment a violation of Title VII was the easiest to make. In 1977, the D.C. Circuit first recognized that the conditioning of employment-related economic benefits on sexual favors was sex discrimination. In *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the plaintiff alleged that her job had been eliminated by her male supervisor because she refused his sexual advances; advances that would not have been tendered had Barnes been a man. *Id.* at 985. The Court of Appeals held that

> [b]ut for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.

Id. at 990 (footnotes omitted).

Courts were slower, however, to recognize the hostile environment theory of sexual harassment. Again, looking to existing sex and race discrimination jurisprudence, advocates argued that sexual harassment should be prohibited under Title VII. Title VII's antidiscrimination prohibitions applied not only to actions of an economic nature, such as hiring, firing, or promotions, but also to the noneconomic "terms, conditions, or

privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1994). Early "terms and conditions" cases established, on a case by case basis, that Title VII prohibited a range of practices that granted women lesser workplace privileges than men.[3] Ultimately, these practices were found to violate Title VII because Congress intended that the law strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13

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[3] *See, e.g., Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 194 n.3 (6th Cir. 1978) (giving female physical education teachers inferior locker and shower facilities); *Trivett v. Tri-State Container Corp.*, 7 Fair Empl. Prac. Cas. (BNA) 1292, 1296 (E.D. Tenn 1973)(requiring female employees to remain at their posts while allowing male employees to line up and clock out first); *Laffey v. Northwest Airlines, Inc.*, 6 Fair Empl. Prac. Cas. (BNA) 902, 910-912 (D.D.C. 1973) (imposing height and weight requirements for female but not male employees, forbidding female but not male employees from wearing eyeglasses, and imposing a no-marriage rule on female but not male employees); *Richards v. Griffith Rubber Mills*, 30 F. Supp. 338, 339-40 (D. Or. 1969)(requiring mandatory rest periods for female workers only, thereby eliminating females from consideration for certain positions); EEOC Dec. No. 71-109, 1973 EEOC Dec.(CCH) § 6165, at 4277-78 (July 29, 1970) (affording men, but not women, the right to smoke while they worked): EEOC Dec. No. 70-503, 1973 EEOC Dec. (CCH) § 6114, at 4207-08 (Feb. 4. 1970) (paying death benefits to surviving spouses of male employees, but not female employees); *Nabisco Settles Restroom-Break Suit*, 1996 Daily Lab. Rpt. (BNA) 77 (April 22. 1996) (discussing *Hernandez v. Nabisco, Co.*, No. CV 153713 (Cal. Sup. Ct. Apr. 17, 1996)) (women allowed to use the restroom only during breaks, whereas men allowed to do so anytime they wanted).

(1978), *quoting, Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).[4]

Having established that Title VII did not necessarily require a showing of wage-based injury, courts soon recognized that harassing conduct could alter the work environment in a discriminatory manner just as surely as policies that provided men and women with different amenities or imposed different sex-based rules.

Courts first recognized that harassment could constitute a discriminatory term or condition of employment in national origin and race cases. In *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), the plaintiff challenged the offensive work environment created by her employer, an optometrist who operated his practice in a discriminatory manner by

> "segregating," his Hispanic and Anglo patients. The Fifth Circuit held that the phrase "terms, conditions privileges of employment" in [Title VII] is an expansive concept which sweeps within its

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[4] This language was again cited approvingly by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. at 228, and *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also* Nadine Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 349 (1980) (charging that "stereotypical role expectations" have hampered the effectiveness of Title VII in combating workplace discrimination directed against women, and arguing that they be recognized as "discrimination *per se*").

> protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination ... One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers...

Id. at 238. The *Rogers* conception of national origin based discriminatory workplace "pollution" was later extended to workplace harassment based upon race,[5] and religion.[6]

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[5]*See e.g., Swint v. Pullman-Standard*, 539 F.2d 77, 89-90 (5th Cir. 1976) (discriminatory job assignments, even absent salary discrimination or economic harm); *Steadman v. Hundley*, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (supervisor's racial slurs and unfairly adverse recommendations may lead to Title VII violation); *Murry v. American Standard, Inc.*, 373 F. Supp. 716, 717 (E.D. La. 1973)(black employee called "boy"), *aff'd*, 488 F.2d 529 (5th Cir. 1973); EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. (BNA) 852, 852 (May 12, 1972) (racially derogatory graffiti); EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. (BNA) 837, 837-38 (Feb. 2, 1972) (racial joke using "nigger" in training program); EEOC Dec. No. 72-0779, 4 Fair Empl. Prac. Cas. (BNA) 317, 317-18 (Dec. 30, 1971) (black employee called "nigger"); EEOC Dec. No. 71-720, 3 Fair Empl. Prac. Cas. (BNA) 142, 142 (Dec. 17, 1970) (black employee called "little black Sambo").

[6]*See, e.g., Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (supervisor's demeaning religious slurs); *Rattner v. Trans World Airlines*, City of New York Commission on Human Rights, Decision No. 4135-J, September 11, 1973

In time, courts further interpreted Title VII to prohibit sex-based harassment. Note that *sex-based* harassment is not the same thing as *sexual* harassment.[7] Sex-based harassment occurs when a person is harassed in the workplace because of her or his sex through the use of nonsexual conduct. Examples of nonsexual, sex-based conduct include indicating that women shouldn't perform certain kinds of work, *Lipsett v. University of P.R.*, 864 F.2d [illegible] 906 (1st Cir. 1988) (comments that women should not be surgeons), that a "woman's place [is] in the bedroom or the kitchen," *Fox v. Southeast Transp., Inc.*, Civ.A. Nos. 89-1442-WF, 89-1449-WF, 1993 WL 543203 at *2 (D Mass. Dec. 9, 1993), *aff'd*, 25 F.3d 1037 (1st Cir. 1994), that hiring women was undesirable because they would quit and get married, *Parton v. GTE North, Inc.*, 802 F. Supp. 241, 245-46 (W.D. Mo. 1991), *aff'd*, 971 F.2d 150 (8th Cir. 1992), or that they were taking jobs from men with families, *Fox*, 1993 WL 543203 at *2. These early sex-based harassment cases, like the race-based harassment cases, took one of two principal forms: the harassment either conveyed

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(antisemitic graffiti).

[7]*See Harassment on the Basis of Sex and Related Conduct Not Constituting Sexual Harassment*, E.E.O.C. Comp. Man. (CCH) § 615.6. ¶3105, at 3217 (Jan. 1982) ("Sexual harassment is one type of harassment based on sex. However, it is not the only type of unlawful harassment which is sex-based or which stems from sex discrimination. For proper processing and investigation of harassment charges, it is important to correctly distinguish sexual harassment from other forms of sex-based harassment and related conduct.")

the harasser's subjective discriminatory mental state (e.g., women should stay home and have babies or are not fit for certain types of work), or it could have been motivated by a number of reasons, including sexist attitudes (e.g., denying female workers adequate breaks.) *See* EEOC Dec. No. 71-2046, 1973 EEOC Dec. (CCH) ¶ 62[illegible] at 4428 (May 12, 1971) (female employees as a class placed in shifts that did not qualify for breaks).

In the first kind of case, the discriminatory nature of the harassment was transparent from the substance of the harassing conduct--it bespoke sex stereotyping. These cases factually echoed early race-based harassment cases in which African Americans were harassed for being "uppity"[8] or "trouble-makers."[9] In both

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[8]*See, e.g., Robertson v. Granite Sch. Dist.*, No. 90-4164, 1992 WL 2883, at *2 (10th Cir. Jan 7, 1992) (African-American male school coach terminated in part because he was "an uppity nigger"); *Williams v. Cerberonics*, 871 F.2d 452, 456 (4th Cir.1989) (terminated African-American woman referred to as that "black uppity female"); *Marable v. H. Walker & Assoc.*, 644 F.2d 390, 396 (5th Cir. 1981)(finding that a landlord refused to rent to African-American man because, *inter alia*, he was "uppity"); EEOC Dec. No. 70-198, 1973 EEOC Dec. (CCH) ¶ 6087, at 4133 (Oct. 9, 1969) (black employee discharged because his self-confident manner caused resentment among white employees).

[9] *See, e.g., Daugherty v. City of Danville*, No. 87-5850, 1988 WL 90892 at *4 (6th Cir. Sept. 1, 1988) (former African-American police officer alleged chief of police said he wanted to weed out "nigger troublemakers"); *Thomas v. Daniel Parker*, Civ. A. No. 76-1852, 1979 WL 149 at *7 (D.D.C. Feb. 8. 1979) (black Foreign Service officer denied tenure because he was "greatly concerned with

contexts, the harassment was undertaken because women and/or people of color had violated gender and race stereotypes. In the second kind of case, however, further evidence was necessary to prove that the harassing conduct was undertaken "because of the target's sex." This additional evidence put the harassment in a context that revealed its discriminatory nature by showing that similarly situated male workers were not treated similarly. In either case, the underlying notion was that a person should not suffer harassment, sexual or otherwise, in the workplace because of his or her sex.

Based upon these precedents, it was argued that Title VII's proscriptions against sex discrimination should be understood to prohibit not only sex harassment, but sexual harassment--that is, conduct of a sexual nature. In *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the D.C. Circuit Court of Appeals accepted the proposition that sexually hostile work environments were sexually discriminatory in nature. In *Bundy*, a female employee alleged that her immediate male supervisor had propositioned her numerous times and had frequently engaged in offensive sexual conversations with her. To make matters worse, when she reported the incidents to her supervisor's male superior, *he* asked her to go to a motel to have sex with him, and remarked that "any man in his right mind would want to rape you." *Id.* at 940. Relying on their 1977 decision in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the D.C. Circuit held that this conduct amounted to discrimination because of Sandra Bundy's sex. Noting that *Barnes* acknowledged

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minority rights" which made him a "trouble-maker."); EEOC Dec. No. 71-1677, 3 Fair Empl. Prac. Cas. (BNA) 1242, 1243 (Apr. 12, 1971)(black female employee called "trouble-maker").

the problem of *quid pro quo* harassment, the *Bundy* court extended the *Barnes* holding to instances of hostile environment harassment.

The "hostile environment" interpretation of Title VII, which began with *Bundy* in 1981, culminated in this Court's statement in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that discriminatory employment practices reached not only a "tangible loss" of "an economic character" because of a person's sex, *id.* at 64, but that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive environment." *Id.* at 66. Chief Justice Rehnquist declared on behalf of an unanimous Court that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64.

Sexual harassment could be understood to be a form of sex discrimination "without question" in *Meritor* because the law of workplace equality had evolved to the point where practices, both sexual and non-sexual in nature, that had the purpose or the effect of perpetuating forms of sex-role stereotyping, were taken to be paradigmatic cases of sex discrimination.

Such was the analysis adopted by the court in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1496 (M.D.Fla. 1991). There, women workers in the shipyards were forced to work in conditions in which they were constantly exposed to pictures of nude women, many in sexually suggestive or submissive positions, *id.* at 1494-96, comments of a sexual nature were directed at them repeatedly, *id.* at 1498-1500, they were touched on their breasts and other body parts, *id.* at 1499-1500, and the women were told

numerous times that the men did not want to work with them, *id.* at 1498. In finding, that these conditions created a sexually hostile work environment in violation of Title VII, the court credited expert testimony that showed that in circumstances such as those at the Jacksonville Shipyards, the "evaluation of women employees by their coworkers and supervisors takes place in terms of the sexuality of the women and their worth as sex objects rather than their merit as crafts workers." *Id.* at 1503. In addition, the testimony showed that sexual stimuli in the workplace, such as nude pictures of women, "may encourage a significant proportion of the male population in the workforce to view and interact with women coworkers as if those women are sex objects." *Id.* Thus, the court concluded that "[t]he expert testimony ... provides solid evidence that the presence of the pictures ... sexualizes the work environment to the detriment of all female employees." *Id.* at 1523. *See also Doe v. City of Belleville, Illinois*, 119 F.3d 563 (7th Cir. 1997)(sexual harassment of women considered a form of sex stereotyping).

Just as it violated sex discrimination principles to prohibit women from working in the construction trades because this was "men's work," so too did sexual harassment violate laws prohibiting discrimination "because of sex": it has the effect of impermissibly stereotyping women workers as sex objects, rather than competent co-workers.

II. SAME-SEX SEXUAL HARASSMENT CAN BE A FORM OF SEX ROLE STEREOTYPING PROHIBITED BY TITLE VII

The principles of equality that animate Title VII sexual

harassment doctrine in cases where the harasser and the victim are of different sexes can apply with equal force where the harasser and the victim are of the same sex. Yet, the Fifth Circuit in *Oncale* held that, as a matter of law, the sexual harassment of a man by another man or men could never constitute discrimination because of sex. In this view, the Fifth Circuit stands alone among the circuit courts of appeal that have reached the question. The Fourth, Sixth, Seventh, Eighth, and Eleventh circuits have all concluded, for varying reasons, that same-sex sexual harassment claims are actionable under Title VII. See *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996),[10] *Yeary v. Goodwill Indus.-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997), *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996), *Fredette v. BVP Management Assocs.*, 112 F.3d 1503 (11th Cir. 1997).

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[10] The Fourth Circuit's recognition of same-sex harassment claims is limited to those instances in which the plaintiff can demonstrate the harasser's homosexuality-in-fact. *See Wrightson*, 99 F.3d at 17. This view of the wrong of sexual harassment -- one which limits actionable conduct to the inappropriate expression of sexual desire – is clearly misplaced. Plaintiffs in different-sex sexual harassment cases have never been required to demonstrate the heterosexuality of their harassers, nor should they. Persons who engage in offensive and unwelcome conduct of a sexual nature, whatever their sexual orientation, do so for a variety of reasons, such as disdain for the person harassed, a desire to force persons like the victim out of a particular type of job, a way of showing off to other workers, or sexual desire for the victim. There is no principled reason to adopt a special rule in same-sex sexual harassment cases with respect to proof of the sexual orientation of the harasser.

A. Title VII Prohibits The Sexual Harassment Of A Man By Other Men Because He Is Perceived To Be Insufficiently Masculine

The Seventh Circuit has provided the most recent and most thoroughgoing consideration of the justiciability of same-sex sexual harassment claims under Title VII.[11] In *Doe v. City of Belleville, Illinois*, 119 F.3d 563 (7th Cir. 1997), the court considered the sex discrimination claims of two brothers who alleged that they had been subjected to "a relentless campaign of harassment by their male coworkers," *id.* at 566, because one of them, H.Doe, wore an earring and the other, J. Doe, was somewhat overweight. The harassment was principally initiated by one male coworker, an ex-Marine, who asked H. Doe whether he was a girl, called him "bitch," "fag" and "queer," and several times threatened to sexually assault him. *Id.* at 566-67.[12]

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[11] A New Jersey trial court has also provided a principled way to understand how same-sex sexual harassment can amount to sex discrimination. *See Zalewski v. Overlook Hospital*, 692 A.2d 131 (N.J. Sup.Ct. 1996)(court found sexual harassment of male employee by male coworkers because they believed him to be a virgin and effeminate to be sex discrimination because he was perceived by his male coworkers as insufficiently masculine).

[12] The facts of *Doe v. City of Belleville* are typical of many same-sex harassment cases where efforts to demean a person on account of their gender include homophobic insults, even where the harassers do not believe the victim to be homosexual. This was the case, it appears, in *Doe*, where the harassers held no belief that their

The court of appeals regarded these facts as presenting a "straightforward" case of sexual harassment prohibited by Title VII. *Id.* at 575.

> One may reasonably infer from the evidence before us that H. Doe was harassed 'because of' his gender. If that cannot be inferred from the sexual character of the harassment itself, it can be inferred from the harassers' evident belief that in wearing an earring, H. Doe did not conform to male standards. Thus the repeated inquiries as to whether he was "a guy or a girl," for example.

Id. Because the harassment of H. Doe was unmistakably gender-based, the court concluded that it amounted to discrimination

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victim was in fact gay, but merely deployed homophobic epithets as a means by which to harass him. *See also Gerd v. U.P.S., Inc.*, 934 F.Supp. 357. 358 (D.Colo. 1996)(male plaintiff asked whether his phone book contained "all your boyfriends [sic] numbers"); *Vandeventer v. Wabash National Corp.*, 887 F.Supp. 1178 n. 2 (N.D.Ind. 1995)(victim called a homosexual where there was no evidence or even allegation that the harasser believed the victim to be gay); *Morrison v. Dalton*, 1994 WL 727943 *1 (E.E.O.C. Dec. No. 01940137)(July 14, 1994)(male plaintiff asked, "Hey faggot, where's your boyfriend?"): *Diiorio v. Perry*, 1994 WL 741630 *1 (E.E.O.C. Dec. No 01941379)(November 22. 1994)(male plaintiff told that he "didn't have much muscle for a man"). These cases make clear how anti-gay sentiment can often be a form of, or at least a close relation to, sex stereotyping.

"because of sex."[13]

Central to the Seventh Circuit's decision in *Doe*, and key to the resolution of cases such as Mr. Oncale's, is an appreciation of the connection between sexual harassment and gender stereotypes. That Title VII addresses gender stereotypes was made most clear in *Price Waterhouse, Inc. v. Hopkins*, 490 U.S. 228 (1989). There, the defendant accounting firm denied partnership to the plaintiff, Ann Hopkins, because she was "macho" and used profanity and because her superiors thought that she should take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. This Court held that Title VII prohibits discrimination against women who are not sufficiently feminine, stating that "an employer who acts on the basis of a

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[13] In the opinion of *amici*, the Seventh Circuit's reasoning in *Doe* correctly applies traditional sexual harassment doctrine to a case of same-sex sexual harassment in contrast to other cases where male plaintiffs lost their Title VII claims based upon sets of facts similar to those in *Doe*. *See Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988)(male harassed by other males because he blushed easily and was abnormally sensitive to comments pertaining to sex); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135 (S.D. Tex. 1993)(male plaintiff sexually harassed by other male coworkers because he would not engage in their dirty conversations and because he had disapproved and complained of his co-workers' use of profanity at work); *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S. Ct. 72 (1996)(sexually inexperienced developmentally disabled man sexually harassed by male co-workers).

belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250.

Price Waterhouse represented an important advance in Title VII law, one that provided the undergirding for the Seventh Circuit's decision in *Doe*. "[T]he fact that H. Doe was singled out for this abuse because [of] the way in which he projected the sexual aspect of his personality," rendered the complained of conduct discrimination "because of sex." *Doe v. City of Belleville*, 119 F.3d 563, 580. *Price Waterhouse* instructed that employment decisions made on the basis of *gender role identity* are discrimination "because of one's sex." The Fifth Circuit ignored this principle in *Oncale*.

B. The Fifth Circuit Erred In Requiring A Showing of Class-Based Treatment to Establish Discriminatory Intent

The circuit court below relied heavily upon an unpublished Fifth Circuit opinion in which the court dismissed a male plaintiff's allegations that he had been sexually harassed by another man. *Oncale*, 83 F.3d at 119-120, *citing*, *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993)(per curium)(unpublished), *cert. denied*, 513 U.S. 925 (1994). The court summarized the *Giddens* holding as, "male on male harassment with sexual overtones is not sex discrimination without a showing that an employer treated the plaintiff differently because of his sex." *Id.* at 120. The court then went on to cite the only other same-sex sexual harassment opinion from the Fifth Circuit, *Garcia v. Elf Atochem No.Am.*, 28 F.3d 446 (5th Cir. 1994), for the proposition that "Title VII addresses

gender discrimination ... Thus, what Locke [the male defendant] did to Garcia [the male plaintiff] could not in any event constitute sexual harassment within the purview of Title VII." *Id.* at 120 (internal quotation marks omitted).

However, the court's conclusion - that male-on-male sexual harassment could never constitute a form of sex discrimination - does not follow, ineluctably or otherwise, from the two premises upon which the court relied: i) that "because of sex" is an element of the sexual harassment plaintiff's prima facie case, and ii) that Title VII prohibits gender discrimination.

To demand, as did the Fifth Circuit below, that the sexual harassment plaintiff show that he or she was treated "differently because of his [or her] sex," *Oncale*, 83 F.3d at 120, is to conceive of sexual harassment solely as a form of disparate treatment. While proof of disparate treatment is sufficient to make out a sexual harassment claim under Title VII, it is not necessary. For example, in *Robinson v. Jacksonville Shipyards*, the evidence demonstrated, among other things, that the women workers as a group were sexually harassed precisely because they were women - they were unwelcome female workers in the previously all-male shipyard. *Robinson*, 760 F.Supp. at 1498. Similarly, in *Hall v. Gus Const.Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988), women who worked on a road construction crew were targeted for harassment of both a sexual and non-sexual nature because they were women. *Id.* at 1014. In cases of this kind - frequently cases in which women have obtained jobs traditionally held by men - the easiest way for the female plaintiffs to make out their prima facie case is to show that women as a class were treated differently than men. The fact that the harassing conduct was sexual in nature may make

the harm particularly painful for the female victims, but proof of its sexual nature is not a necessary element of the plaintiffs burden of showing that the conduct was undertaken because of sex: women and men were treated differently, whatever the content of the offensive conduct.

While class-based proof of the disparate treatment of workers on the basis of sex may be sufficient to make out the plaintiff's case, it is not necessary that the plaintiff show that all or many members of his or her class were so treated. Surely Title VII does not require that either male or female sexual harassment plaintiffs establish themselves as fungible representatives of their "sexual group" in order to make out a claim of sex discrimination. Yet the Fifth Circuit opinion in *Oncale* cites approvingly *Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D.Ill. 1988),[14] in which the court required that the sexual harassment plaintiff show that he worked in an antimale environment." *Id.* at 1456. As Professor Kathryn Abrams observed in her analysis of the *Goluszek* case, the antimale environment rule requires a showing that

> the behavior challenged must operate, in some respect, against all members of the protected group. ... [I]n other words, it could have happened to any man, but not to any woman. In *Goluszek*, the court took this categorical logic one step further: it must be treatment that not only could have happened to any man but tends to reflect negatively on men as a group or create an environment hostile to men.

Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH.L.REV. 2479, 2514 (1994). Such a standard imposes an inappropriately heavy burden on plaintiffs while encouraging defendants to produce other members of the plaintiff's sex who could testify to the fact that they, as a woman, or as a man--that is, in their capacity as class representatives--did not regard the conduct complained of as offensive.

In *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996), for instance, a male employee objected to a common workplace antic called "bagging." "Bagging" is a practice whereby a person is grabbed from behind and picked up off the ground while another person squeezes the victim's testicles. *Quick v. Donaldson Co.*, 895 F.Supp.1288, 1292 (S.D.Iowa 1995), *rev'd*, 90 F.3d 1372 (8th Cir. 1996)("Quick alleges that at least twelve different male co-workers bagged him on some 100 occasions.") When Quick complained about this behavior, his employer "told him that the next time somebody bagged him 'to turn around and bag the shit out of them.'" *Quick*, 90 F.3d at 1375.

In *Quick*, the Eighth Circuit found that a same-sex sexual harassment plaintiff could survive a summary judgment motion if there were some evidence that male employees, but not female employees, were bagged in this workplace. In that case, "a fact-finder could reasonably conclude that the treatment of men ... was worse than the treatment of women." *Id.* at 1379. This is, of course, a demand for proof of the disparate treatment of men and

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[14]"The Seventh Circuit in *Doe v. City of Belleville*, all but overruled the *Goluszek* decision: [w]e therefore reject the narrow construction of Title VII advanced in Goluszek..." 119 F.3d 563, 574.

women. But such a demand would be impossible to meet in an all-male workplace such as that in which Oncale worked, and in which many same-sex harassment claims arise. Again, while traditional disparate treatment evidence would be sufficient to prove that the offending conduct was undertaken because of sex, it is not necessary.

The antimale or antifemale requirement also raises problems of ripeness, as the court in *Tanner v. Prima Donna Resorts, Inc.*, 919 F.Supp. 351 (D. Nev. 1996), correctly observed:

> Title VII creates an individual claim which is ripe before the work environment has been poisoned for all workers of one sex or the other. It does not require that the work environment be hostile to all workers of the plaintiff's sex; it requires that the environment be hostile to the plaintiff.

Id. at 354 (citations omitted). Thus, the because of sex element of the sexual harassment plaintiff's case *can* be met by showing that women and only women, or men and only men, were singled out for sexually harassing treatment, but it need not be.

Relatedly, the fact that the harasser and the victim are of different sexes may reinforce a plaintiff's claim of discrimination, but it is not necessary to the claim. In *Price Waterhouse* the Court recognized that Ann Hopkins was denied partnership because she was insufficiently feminine to conform to the accepted gender stereotypes at her firm, not because the partners making the

decision were all men. Yet, according to the Fifth Circuit rule, if some or all of the partners at Price Waterhouse had been women who disapproved of Hopkins' gender identity, and for that reason they denied her partnership, that adverse job action "could not in any event constitute sexual [discrimination] within the purview of Title VII." *Oncale*, 83 F.3d at 120, *quoting, Garcia*, 28 F.3d at 452. The fact that it might have been women and men together, or women exclusively who enforced a gender stereotype in *Price Waterhouse*, should not render their conduct inoffensive to Title VII. Just as courts have recognized that federal anti-discrimination laws prohibit *intra-racial* discrimination on the basis of race, *see e.g. Walker v. Secretary of Treasury, I.R.S.*, 713 F.Supp. 403 (N.D.Ga. 1989)(Title VII); *Hansborough v. City of Elkhart Parks and Rec. Dept.*, 802 F.Supp. 199 (N.D.Ind. 1992)(Title VII); *Rodriguez v. Gattuso*, 795 F.Supp. 860 (N.D. Ill. 1992)(Fair Housing Act); *Franceschi v. Hyatt Corp.*, 782 F.Supp. 712 (D.Pr.1992)(§1981), so too should Title VII be interpreted to prohibit *intra-sexual* discrimination on the basis of sex. Nothing within either the text or history of Title VII requires that the perpetrator and the victim of sex-based discrimination be of different sexes.

III. UNWELCOME SEXUAL CONDUCT DIRECTED TOWARD A MEMBER OF THE SAME SEX MAY CONSTITUTE SEX DISCRIMINATION EVEN IN THE ABSENCE OF A SHOWING OF DISPARATE TREATMENT

In traditional harassment cases where the plaintiff alleges hostile conduct of a sexual nature, most courts, including this

Court in *Meritor*, are willing to infer,[15] if not conclude,[16] that the conduct was based upon sex without demanding any specific proof thereof beyond the sexual nature of the conduct. In the traditional sexual harassment scenario, where a man has engaged in unwelcome and offensive sexual conduct toward a woman in the workplace, proof of conduct that is consistent with the description of sexual harassment

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[15] *See, e.g, Smolsky v. Consolidated Rail Co.*, 780 F. Supp. 283, 295 (E.D. Pa. 1991) (comments such as "[I] would like to 'get into her pants' . . . . create the inference that the harassment and discrimination where intentional and based on the fact that the plaintiff was a woman"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) ("[S]exual behavior directed at women will raise *the inference* that the harassment is based on their sex.") (emphasis added) *(citing Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904-05 (11th Cir. 1988)).

[16] *See Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language *is implicit, and thus should be recognized as a matter of course.* A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.") (emphasis added); *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988) (finding offensive and sexual nature of cartoons sufficient to establish that harassment was based on sex); *Konstantopoulos v. Westvaco Corp.*, 893 F. Supp. 1263, 1277 (D. Del. 1994). *aff'd*, 112 F.3d 710 (3d Cir. 1997)("Because at least some of the conduct at issue was sexually explicit, it is fair to draw the conclusion that, by virtue of this conduct plaintiff suffered intentional discrimination because of her sex.").

in the EEOC Guidelines[17] will typically establish a prima facie case. Proof of the "because of sex" element is generally not required: "once the plaintiff in such a case proves that harassment took place, the most difficult legal question typically will concern the responsibility of the employer for that harassment." *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

Thus, on *Meritor's and Robinson's* facts, where a man is charged with sexually harassing a woman, and the conduct is severe or pervasive, unwelcome, and hostile to a reasonable person, courts often regard the conduct as a kind of *per se* violation of Title VII. It is both reasonable and efficient to draw this inference in the typical sexual harassment case where a man subjects a woman to offensive sexual comments, come-ons, or physical abuse because sexist stereotyping is what the unwelcome sexual conduct *means* under these circumstances. *See Doe v. City of Belleville, Illinois*, 119 F.3d 563, 575-76 (7th Cir. 1997).

But what of same-sex harassment? Can the same inferences be drawn when a man is the victim of offensive and unwelcome sexual conduct, such as that alleged by Mr. Oncale? Not as easily, yet the recognition that such sexual conduct is not <u>always</u> discriminatory does not support the Fifth Circuit's conclusion that it can <u>never</u> be discriminatory. In effect, the Fifth Circuit's

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[17] The EEOC guidelines provide that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1981).

reasoning in *Oncale* signals a return to the draconian treatment female sexual harassment plaintiffs received in the 1970s. *See Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (D.Ariz. 1975). The Fifth Circuit has misunderstood the connection between unwelcome conduct of a sexual nature and sex stereotyping, just as courts misunderstood the relationship between sexual harassment and the sex stereotyping of women two decades ago. Contemporary Title VII doctrine has advanced well beyond this narrow view of the harm of sexual harassment.

Given that the Fifth Circuit was clearly wrong to hold, as a matter of law, that a man can never discriminate against another man, the question remains: Could unwelcome and offensive conduct of a sexual nature between persons of the same sex be reasonably understood as discriminatory under Title VII? Clearly it can. Where a male employee, for instance, endures offensive and unwelcome sexual harassment from his male coworkers because he does not live up to a stereotypic norm of proper masculinity, that person has been discriminated against because of his sex just as surely as Ann Hopkins was for failing to live up to the Price Waterhouse partners' stereotype of femininity.

When unwelcome and offense conduct of a sexual nature is used as a means to humiliate, intimidate or harass a person because of his or her gender identity, whether between persons of different or the same sexes, prior Supreme Court precedent as well as the plain meaning of Title VII supports the proposition that this conduct was "undertaken because of sex."

Other evidence may also suffice to show that same-sex sexual harassment amounts to discrimination because of sex.

Consider, for instance, a workplace culture which is permeated by a kind of "locker room" mentality, in which men engage in sexual conduct toward each other, and no one particular man is singled out for more egregious treatment, as was H. Doe. If one man or men regards the behavior offensive and unwelcome, makes his objection to the conduct known, and he becomes the target of continuing offensive sexual conduct, then a fact-finder could reasonably conclude that the conduct was undertaken because of sex.

In *Quick v. Donaldson Co.*, for instance, the circuit court could have invited additional evidence as to whether Quick was selected for bagging or other offensive conduct precisely because he had made his objections to the practice known. Indeed, there is some evidence in the court's opinion that this might have been the case.[18]

Here, *amici* urge that the Court reverse the court of appeals' determination that Title VII bars all same-sex sexual harassment claims, and remand the case for further fact-finding with respect to the circumstances under which Mr. Oncale alleges he was sexually harassed in order to determine whether that harassment amounted to discrimination because of sex. A more extensive inquiry is appropriate where, as here, the inferences that can reasonably be drawn in traditional sexual harassment cases - to wit, that the conduct had the purpose or effect of perpetuating sex stereotyping - cannot be so easily inferred from the sexual nature

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[18] "It appears that after Quick objected to being bagged, the violence he suffered escalated to a point where he was punched in the neck. *Quick*, 895 F.Supp. 1288, 1292.

of the conduct. Among the evidence that the trial court may find probative on this point is whether Mr. Oncale was singled out for harassment because of his failure to live up to some standard of masculinity, or whether he suffered continued offensive sexual conduct because he objected to a hypermasculine environment in his all-male workplace.

CONCLUSION

The Court should find that the prohibitions against workplace sex discrimination contained in Title VII include a prohibition against same-sex sexual harassment when such conduct was undertaken because of sex.

Respectfully submitted,

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APPENDIX A

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